

**UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD**

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| In the matter of: |) |
| |) |
| Denise Avallon, |) |
| |) |
| Charging Party, |) |
| |) |
| and |) |
| |) |
| Teamsters Local Union No. 25, a/w, |) |
| International Brotherhood of Teamsters, |) |
| |) |
| |) |
| And |) |
| |) |
| Parties to Contract |) |
| |) |

Case No. 1-CB-10822

**EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

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Dated: August, 23 2010

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**EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

Petitioner, Teamsters Local Union No. 25 ("Local 25" or "Union"), pursuant to Section 102.45 of the National Labor Relations Board's ("Board") Rules and Regulations hereby files the following Exceptions to the June 7, 2010 Decision of the Administrative Law Judge ("ALJ") in NLRB Case No. 1-CB-10822:

1. To the finding that the Transportation Coordinators ("TC") did not consider a Casual List driver that they had not previously worked with. Decision 18.
2. To the finding that the TCs referred non-listed drivers to a production on any occasion when qualified drivers were available on the Union's Casual List. Decision 18.

3. To the specific finding of facts that Kelleher referred/hired day players Bill Owerka, Jim Bilack, Chad White, Pat Friel and Mark Cavanaugh for the “Bride Wars” production, none of whom are contained on the casual list. Decision 6.
4. To the specific finding of fact that Wright called Harrington for the names of out of work oilmen. Decision 18
5. To the conclusion that the Union violated Section 8(b)(1)(A) in the operation of its hiring hall. Decision 20.
6. To the conclusion that the Union violated Sections 8(b)(1)(A) and 8(b)(2) specifically by its failure and refusal to refer Avallon. Decision 21
7. To the findings that no employer ever requested that Avallon be removed from a production, dismissed from a job or complained about her work performance to the Union. Decision 21-22
8. To the conclusion “that the Union has not successfully demonstrated that referring Avallon would have jeopardized its relationships with contracting employers.” Decision 23
9. To the conclusion that the Union violated 8(b)(1)(A) and 8(b)(2) by failing to refer individuals from the Casual List who were unknown to the TCs. Decision 23
10. To each of the conclusions of law listed in paragraph 3 on page 24 of the Decision.
11. To the conclusion that the Union deprived Avallon of income and benefits she would have earned but for the Union’s transgressions. Decision 25

I. Statement of the Case

The hearing in this matter was held on January 26, 27 and 28, 2010 in Boston, MA based upon a charge filed by Ms. Denise Avallon against Local 25. In his June 7, 2010 Decision, the Administrative Law Judge Mark Rubin found that Local 25 violated the National Labor Relations Act (the “Act”), 29 U.S.C. § 151 *et seq.* in two respects. The first involved an allegation that Local 25 did not follow its own referral rules in providing drivers from its Casual List to various movie and television productions.¹ The second allegation was that Local 25 violated the Act in failing to refer Denise Avallon as a driver to various movie productions.

Local 25 asserts that it lawfully uses objective standards and also exercises reasonable judgment when deciding to refer a given individual to a given job. It is Local 25’s position that such referrals are legal and necessary to the performance of Local 25’s representative functions under the Act. The ALJ misconstrued the evidence in the record to find that Local 25 violated the Act by hiring individuals who were not on the Union’s Casual List when they were in fact on the list, by incorrectly finding that drivers not known to the Union were not hired and by comparing referrals of the Charging Party, who did not have a commercial driver license (“CDL”), to drivers with the necessary qualifications.

II. Statement of Facts

A. Charging Party

1. Prior Work History

¹ Local 25 concedes that it operates an exclusive hiring hall within the meaning of the Act with respect to drivers employed by movie and television production companies within its jurisdiction.

Denise Avallon became a member of Teamsters Local 25 in 1992. Ms. Avallon testified that she was a part-time worker at United Parcel Service (“UPS”) in 1992, where she started out as a walker and later became a van driver. (Hearing Volume I [“V.I.”] p. 126).

Ms. Avallon then went to work in the movie industry in 1997 when her stepfather, Jimmy Flynn, called her and said that she could work as a Production Assistant on the movie “In Dreams.” (V.I, p.156). At the time, Jimmy Flynn was a Transportation Coordinator for Local 25 in the movie division. After this position ended, Ms. Avallon’s stepfather hired her as a driver on the movie. (V.I, p.158). At this time, Ms. Avallon had no experience in the movie industry other than as a Production Assistant for one week and did not have a CDL.² *Id.* There was no Seniority List for referrals at the time Ms. Avallon began driving on movie productions. (V.I, p.158).

There was much testimony about numerous workplace incidents during Avallon’s tenure while driving for the movies. Ms. Avallon recalled when Kevin Costner, the star of “Message in a Bottle” was playing ball with his son when she was on the set. (V.I, p.165). She testified that the ball came to her and she threw it back to Kevin Costner. *Id.* Local 25 witnesses, however, all testified that this exchange escalated into a security issue for Mr. Costner.

Ms. Avallon also recalled having a conversation with fellow driver Bob Carnes during “Message in a Bottle” about driving too slowly across the Wiscasset Bridge in Maine. (V.I, pp.166-167). Avallon acknowledged that the next day Carnes complained to her that while driving Paul Newman, he had to pass and get around her vehicle. *Id.*

Ms. Avallon admitted that she was in fact removed from driving wardrobe personnel on “What’s the Worst That Could Happen?” in 2000 due to work performance problems. (V.I,

² Numerous witnesses discussed the different driver’s licenses in Massachusetts, and they are summarized in General Counsel’s Exhibits (“GC”) 35 and 36.

p.168). She even acknowledged that she had told William O'Brien, Sr. that someone hit her vehicle when it was parked. (V.I, p.166). However, Avallon believed that the incident occurred on "What's the Worst That Could Happen?" and not on "Message in a Bottle", as described by Local 25 witnesses.

Avallon testified that she believed that she was removed from the Seniority List by the previous Local 25 administration because she was unable to obtain a commercial driver's license. (GC-41; V.I, p.186). She acknowledged that after receiving the 2003 letter from then-President Reardon, she tried to take the written test for obtaining a CDL. (V.I, p.184). Ms. Avallon failed the CDL test at least once, possibly twice. *Id.*

Ms. Avallon never received any official notification that she was removed from any list in 2003. (V.II, p.208). In fact, she was not sure if her name was removed from the list; she just "assumed it was." (V.I, p. 186).

2. Current Allegations

Ms. Avallon saw an article in The Boston Globe magazine about the "well-behaved Teamster" and the local movie industry in January of 2008. (V.I, p.196; Respondent Exhibit "R"-2). Ms. Avallon stated that she recognized a driver in the picture in the article and remembered that he did not have a CDL when she worked with him in the past. (V.I, p.197).

Ms. Avallon testified she then contacted Local 25 Business Agent Mark Harrington in February of 2008 and asked him if she needed a CDL to drive in the movies. (V.I, p.116). According to Avallon, Harrington told her she did not need a CDL, but since she had left the industry and was removed from the regular Seniority List, she could not return to the Seniority List. *Id.*

Ms. Avallon testified that she mailed a copy of her license and resume to Mark Harrington at Local 25. (GC-40; V.II, p.216). She was required under the referral rules to submit an updated resume to Local 25. (GC-32; V.II, p.215).

On or about March 6, 2008, Ms. Avallon sent Mark Harrington a handwritten note alleging that she had been refused work because her name was not on the Seniority and Casual Lists. (GC-44). Local 25 promptly responded, stating that her grievance had been received and she was being placed as number 145 on the Casual List. (V.I, p.117; GC-45). Ms. Avallon thought she deserved to be on the regular Seniority List, however, so she appealed Local 25's decision to place her on the Casual List rather than the Seniority List. (V.II, pp.220-221; GC-46).

After reviewing the issue, the Executive Board denied her request to be placed on the regular Seniority List and instead reaffirmed her placement on the Casual List. Ms. Avallon immediately signed her unfair labor practice charge in this matter on April 25, 2008, although she stated that she was not denied a referral to any particular job when she filed her charge. (V.II, p.243).

B. Mark Harrington

Mark Harrington is the Secretary Treasurer and Business Agent for Local 25. He represents employees in forty different industries throughout the Local, including those in the movie industry. (V.I, pp. 44-45). Teamsters Local 25 has jurisdiction for the movie industry in New England, except for Connecticut and Rhode Island, which are under the Teamsters New York contracts. (V.I, p. 47). Under Local 25's contracts with production companies who film in its jurisdiction, it is the exclusive provider of drivers, chauffeurs and helpers on the set. (See GC-54). Under the collective bargaining agreement ("CBA"), Local 25 also provides the

production company with a Transportation Coordinator and Captain who are responsible for overseeing the equipment and driver needs of the production company. Pursuant to Article VI of the CBA, applicants are referred “to the Company from the Union on a nondiscriminatory basis, and such referral will in no way be affected by Union membership or any aspect thereof.” (GC-54, Art.VI)

Mr. Harrington explained that the Seniority List was established in approximately 2003 by the previous administration based upon an individual’s seniority in movies. The current administration of Local 25 has since increased the number of individuals to the Seniority List because of the recent rise in production of movies in Massachusetts. (V.I, p.48). Mr. Harrington explained that Local 25 tries to put as many people on the Seniority List as possible, as long as there is enough work in the industry to support the drivers in full time employment. (V.I, pp.67-68). The intent of Local 25 is to have enough people on the Seniority List to more or less meet the demands of the movie industry in its jurisdiction. *Id.*

In contrast, the Casual List is used as a stop gap measure when additional drivers are needed beyond the Seniority List. (V.I, p.68). He explained that the Casual List is not used unless all of the people on the Seniority List are working. (V.I, p.50). While people on the Seniority List are guaranteed work based on their placement on the list, the Casual List is designed to be more flexible based upon the requirements of the production. (V.I, p.67). A person on the Casual List is not guaranteed employment or any particular referral. (V.I, p.70). Moreover, there is no limit to the number of people on the Casual List. (V.I, p.69-70). The Casual List is typically only used when more than one production is going on at the same time in the area. *Id.* There are usually employees on layoff from other industries on the Casual List.

(V.I, p.69). Mr. Harrington testified that Local 25 does not deny anyone the right to be on the Casual List whether member or nonmember. (V.I, p.49).

Pursuant to the Referral Rules, employers are allowed to select the drivers from the Casual List. (GC-32). However, employers have typically opted not to get involved in selecting drivers from the Casual List. (V.I, p.74). The production companies often need numerous drivers for a limited period of time, and usually prefer to rely on the Transportation Coordinators to select the drivers to meet the transportation requirements. (V.I, p.74-75).

Mr. Harrington agreed that the Transportation Coordinators on the set typically determine which individual driver from the Casual List to refer to a given position. (V.I, p.52) He believes Local 25's first priority when referring a driver in the movie industry is to recommend a quality person. (V.I, p.65).

Mr. Harrington estimated that 90% of the driving positions in the movie industry require a commercial driver's license. (V.I, p.71). Mr. Harrington assists Transportation Coordinators in finding available CDL drivers or drivers with certain license endorsements to fill positions, but he has never had to help Transportation Coordinators find a Class D licensed driver in order to fill a position. (V.I, pp.52-53). He also stated that it was not unusual for a Class D driver on the Casual List not to be reached during an entire year. (V.I, p.82).

Mr. Harrington spoke with Denise Avallon on or about February 6, 2008. Ms. Avallon appealed her removal from the Seniority List through the process in the Referral Rules. Mr. Harrington investigated this appeal and discovered that Ms. Avallon's name was actually removed from the Seniority List on June 24, 2005 by former Field Representative Lou DiGiampaolo. (V.I, p.94; R-4). Consequently, Local 25's Executive Board denied her appeal regarding placement on the Seniority List and confirmed her placement on the Casual List in a

letter dated April 24, 2008. (GC-47). Without reference to the denial of any particular driving position, Ms. Avallon signed her unfair labor practice charge on April 25, 2008.

C. Transportation Coordinators

1. William O'Brien, Sr.

William O'Brien, Sr. is number one on the movie Seniority List and has been a member of Local 25 for almost 50 years. (V.III, p.486). As a Transportation Coordinator, Mr. O'Brien, Sr. first calls drivers available on the regular Seniority List in the order of their position on the list. *Id.* Mr. O'Brien, Sr. agreed that the production companies have not typically interviewed and selected drivers to work on movies as they have the right to do under the movie Referral Rules in effect. (GC-Ex 32; V.III, p.490). Mr. O'Brien, Sr. testified that the first criterion he uses for selecting drivers from the Casual List is their license designation. (V.III, p.491-492). Mr. O'Brien, Sr. testified that he also considers individual's capabilities and qualifications when selecting them to drive on a set. (V.III, p.562). Mr. O'Brien, Sr. stated it did not make a difference to him whether or not he personally knew someone. *Id.* Mr. O'Brien, Sr. explained that he would prefer drivers with Class A and B licenses because they have the ability to drive different types of equipment on the set if necessary. (V.III, p.563-564).

Mr. O'Brien, Sr. started working on "The Ghosts of Girlfriends Past" in February of 2008. (V.III, p.494). Mr. O'Brien, Sr. identified numerous individuals who were highlighted on a Casual List that he used for the movie, who came to work on the set. (GC-68). When "Ghosts of Girlfriends Past" ended in May of 2008, Mr. O'Brien, Sr. went to work on "The Surrogates". On "The Surrogates", a California Coordinator did most of the hiring. (V.III, p.521).

Mr. O'Brien, Sr. worked with Denise Avallon on "Message in a Bottle." (V.III, p.552). Mr. O'Brien, Sr. was the New England Transportation Coordinator on the movie and Ms.

Avallon was a van driver. *Id.* Mr. O'Brien, Sr. recalled complaints regarding Ms. Avallon on the movie. He stated "**the producer came to me about her stalking Kevin Costner.**" (V.III, p.552). Mr. O'Brien, Sr. spoke to Denise Avallon about the producer's **complaint** and Ms. Avallon denied the accusation. (V.III, p.553). Mr. O'Brien, Sr. simply told her to be careful and watch herself. *Id.* As a long time union member, Mr. O'Brien, Sr. does not believe it is his place to discipline or terminate members of the union. (V.III, p.553).

Mr. O'Brien, Sr. testified that he was sitting in a restaurant in Bath, Maine looking out the window at the parking lot as he witnessed Ms. Avallon crash her van into a pole. (V.III, p.556). Ms. Avallon did not mention anything to Mr. O'Brien, Sr. about the incident that evening. The next morning she came to Mr. O'Brien, Sr. and told him that someone backed into her van during the night. (V.III, p.556). Mr. O'Brien, Sr. stated he walked out to the parking lot and showed her the glass of the headlight near the pole, but that Ms. Avallon continued to deny hitting the pole. (V.III, p.557).

Mr. O'Brien, Sr. also worked with Ms. Avallon on "What's the Worst that Could Happen?" Mr. O'Brien, Sr. stated that the wardrobe supervisor came to him and said that while driving down Storow Drive, Ms. Avallon took her hands off the wheel and put her hands over her eyes while ducking. Mr. O'Brien, Sr. eventually reassigned Ms. Avallon to a different van based upon **employer complaints** on this set. (V.III, p.560).

2. William O'Brien, III

Mr. O'Brien, III is currently a member of Local 25 and is on the movie division regular Seniority List. (V.II, p.387). Mr. O'Brien, III worked with Ms. Avallon on the set of "Message in a Bottle" in 1998, and he recalled an incident regarding Ms. Avallon's behavior on this set. (V.II, pp.452-453). At the time of the incident, he was in the base camp attending to his vehicle.

Id. Mr. O'Brien, III stated that he observed Kevin Costner playing catch with his son. *Id.* Mr. O'Brien, III stated that Ms. Avallon walked over and stood next to Kevin Costner as he was trying to play catch with his son. (V.II, p.454). In response to Ms. Avallon's actions, Mr. Costner took the ball and he and his son went into their trailer. *Id.* After this, Mr. O'Brien, III saw security guards escort Ms. Avallon away from Costner's camper. (V.II, p.454). Mr. O'Brien, III was not sure if anything else happened to Ms. Avallon as a result of this incident. *Id.*

On the set of the same movie, Mr. O'Brien, III also observed Ms. Avallon drive her van into a pole in a parking lot. (V.II, p.455). Mr. O'Brien, III stated that he observed her accident while he was in the restaurant around 6 p.m. *Id.* Also present with him in the restaurant were Mr. O'Brien, Sr., Mr. McGrath and Mr. Etherton. *Id.*

Mr. O'Brien, III further reported that he saw Ms. Avallon smoking in her van on the set of "Message in a Bottle." (V.II, p.457). Mr. O'Brien, III also stated that people on the set complained about the incense Ms. Avallon had burning in her van. *Id.*

On the set of "What's the Worst that Could Happen?" in 2002, Mr. O'Brien, III worked as a honey wagon driver.³ (V.II, p.456). Mr. O'Brien, III testified that he was told about an incident on Storrow Drive by a passenger that was riding in the van. *Id.* The passenger told Mr. O'Brien, III that Ms. Avallon was driving down Storrow Drive and Ms. Avallon took her hands off the wheel and ducked when going under a bridge and that the passenger had to grab the wheel. (V.II, p.458-459). Mr. O'Brien, III stated that the passenger said he would never get into a van with Ms. Avallon again. (V.II, p.459).

Mr. O'Brien, III has worked as a Transportation Coordinator on numerous movies, including "Edge of Darkness" in the summer of 2008. He went through the entire Casual List for

³ Honey wagons refer to vehicles which carry bathrooms.

“Edge of Darkness,” but explained that he considers the List exhausted when all the Class A and Class B drivers are gone. (V.II, p.461-462). No one from Local 25 ever told Mr. O’Brien, III not to refer Ms. Avallon to any driving position. (V.II, p.460). Mr. O’Brien, III does not dislike Ms. Avallon, but he does not feel that she is a safe driver. (V.II, p.459).

When referring individuals from the Casual List, the first thing Mr. O’Brien, III considers is license qualifications. (V.II, p.459). He prefers to have Class A drivers on a set if possible because they can drive any type of vehicle. (V.II, p.460). Mr. O’Brien, III was told by Local 25 to select individuals for referral from the Casual List who are qualified for the job, efficient and will give Local 25 a better image. (V.II, p.460). He was also told not to select individuals because they are friends or relatives. *Id.*

Mr. O’Brien, III also stated that after looking at an individual’s license qualifications, he also must consider an individual’s work experience. (V.II, p.462). By way of example, Mr. O’Brien, III testified that he has had Class A drivers who were not familiar with a certain piece of equipment. (V.II, p.463). Before placing that individual on unfamiliar equipment, Mr. O’Brien, III would need to determine if the individual is comfortable driving the assigned equipment. *Id.* In other driving positions, just knowing directions around Boston is the most critical factor. *Id.* Some positions, such as van drivers and star drivers, also require a certain level of “people skills.” *Id.*

To further complicate the referral process, Mr. O’Brien, III stated that he usually needs a driver to show up with a day or half day’s notice because the transportation needs of the production are always changing. (V.II, p.464). At times, there are several productions going on at once in Local 25’s jurisdiction. While going through this process, he is in contact with other Transportation Coordinators regarding driver requirements and availability. *Id.*

3. Robert Carnes

Robert Carnes is a Transportation Coordinator for Local 25. (V.III, p.579). Mr. Carnes was the Coordinator for the “The Proposal” which started in February of 2008 and was prior to Ms. Avallon’s placement on the Casual List. (GC-85). On “Donny McKay” in August of 2008, Mr. Carnes was a Transportation Coordinator as well as a driver. He did not have an office but worked “on the street” so he did not have access to a computer every day. (V.III, p.598).

Mr. Carnes estimated that 90% of Local 25 drivers on a movie set need to have a CDL. (V.III, p.645). Mr. Carnes stated that it was sometimes difficult to find drivers with the right license classification to fill a position, but that he never had a problem finding a non-CDL driver to fill a position. (V.III, p.645). Mr. Carnes would not refer Ms. Avallon to one of the limited number of positions in the movies that did not require a CDL based upon her problematic work history. (V.III, p.646).

Mr. Carnes was the driver for Paul Newman on “Message in a Bottle”. Mr. Carnes witnessed security escorting Ms. Avallon away from base camp, after an incident with Kevin Costner. (V.III, p.640). Mr. Carnes remembered another incident where after a late night wrap, everyone was heading back to the hotels. They were driving on Route 1A South over a two-lane bridge and cars were backed up because of a vehicle traveling 20 mph. Finally, Mr. Carnes was able to pass the slow moving vehicle, and Mr. Newman asked who was driving that van. (V.III, p.641). Mr. Carnes then realized it was Denise Avallon who was driving the van that was holding up traffic and travelling at 20 mph. Mr. Carnes spoke with Ms. Avallon about it the next day. (V.III, p.641). Ms. Avallon responded that she was tired after a long day.

4. Kevin Kelleher

Mr. Kelleher served as a Transportation Coordinator for the film “Bride Wars” which started in or about April of 2008. (V.II, p.258). As the Transportation Coordinator, Mr. Kelleher would select the drivers for the production. *Id.* Mr. Kelleher testified that President Sean O’Brien also told him to call people from the Casual List in order without showing any favoritism. (V.II, p.302).

When he was selecting people from the Casual List, Mr. Kelleher looked for people with a Class A license and experience driving the designated equipment. (V.II, p.303). Beyond the license, experience in the industry is important. Mr. Kelleher testified that he has encountered a situation where a Class A driver could not operate a certain piece of equipment. (V.II, p.304). Mr. Kelleher switched this driver to something that he was more comfortable operating. *Id.* As the Transportation Coordinator for “Bride Wars”, Mr. Kelleher had some experienced drivers, but many of his drivers were inexperienced. (V.II, p.305). Mr. Kelleher testified that he had **problems finding available drivers** in the limited amount of time that he had. *Id.*

Mr. Kelleher testified that he does not know and has never met Denise Avallon. (V.II, p.306). He also testified that no one from Local 25 ever spoke to him about her, and that he would refer her to a position in a movie. *Id.* In fact, he testified that he started calling names on the third page of the Casual List that he used and continued to the end of the List. (GC-51; V.II, pp 280-282). Based on the procedure that he used, he believes that he did call Denise Avallon at least once in order to refer her for employment.⁴ (V. II, p.282).

The record established that at the time that “Bride Wars” was going on, the Casual List was exhausted for CDL drivers. (V.II, 326-327). Mr. Kelleher called the union hall and got the names from Mark Harrington of “oilmen” who were laid off **after the Casual List had been exhausted.** (V.II, pg 284)(emphasis added).

⁴ Ms. Avallon’s name was inadvertently put on this List twice, at number 128 and 145.

Regarding whether or not day players were on the casual list, he stated: “as this industry and the volume grew, the list – I got one list in the beginning. There was constantly people being added to the list.” (V. II, Pg. 290). The ALJ clearly erred and misconstrued the evidence in his conclusion: “Kelleher referred/hired day players Bill Owerka, Jim Bilack, and Mark Cavanaugh for the “Bride Wars” production, none of whom are contained on the Casual List. Kelleher also hired/referred other drivers to “Bride Wars,” including the following drivers, none of whom appear on the Casual List: Chad White, Pat Friel, Billy Owerka [sic].” Decision 6.

However, Bill Owerka, who is listed twice by the ALJ is number 173 on the March Casual List.⁵ Jim Bilack is number 166 on the same list. Mark Cavanaugh is number 212 on the April casual list (GC Exhibit 23) and Chad White is number 187. Pat Friel is listed at number 105 on the list, and he appears on the first Casual List for March. (GC 14).

Further, Jim Bilack, Mark Cavanaugh, Chad White and Pat Friel are CDL licensed drivers with Class A licenses. Bill Owerka is a CDL licensed driver with a Class B license. The fact that these drivers had positions on “Bride Wars” is not comparable to the Charging Party since she was not a CDL licensed driver.

5. James Donahue

Mr. Donahue also worked with Ms. Avallon on the film “Message in a Bottle” in 1998. (V.II, p.358). Mr. Donahue also worked as a driver for the director, Luis Mandoki, on this film. *Id.* He stated that the stars for this film were Paul Newman, Kevin Costner, and Robin Wright Penn. *Id.* On this set, Ms. Avallon’s unprofessional behavior toward talent came up in conversations with Kevin Costner’s driver. (V.II, p.359). Mr. Donahue stated that Kevin Costner’s driver Mary asked if there was any way he could try to keep Ms. Avallon away from

⁵ Because of the volume of work in the movie industry at the time, the Casual List was expanding. There were six different casual lists printed for March of 2008. GC Exhibits 14-19. Mr. Owerka appears on GC Exhibit 18.

Kevin Costner's trailer. *Id.* The driver said that Ms. Avallon was spending a lot of time around the trailer, "looking in the windows" and "making everybody uncomfortable." (V.II, p.360). Mr. Donahue replied that he was not in a position to get involved and that the driver should see the Coordinator or unit production manager. *Id.*

Mr. Donahue stated that he was familiar with the Seniority and Casual referral lists for Local 25. (V.II, p.368). If the Seniority List was exhausted, Mr. Donahue would then turn to the Casual List. He would first try to hire as many Class A drivers as possible because they can operate any vehicle and are easy to move around in the fast-paced industry. (V.II, p.369). Mr. Donahue stated that it made his job easier as a coordinator to have Class A drivers working. (V.II, p.370). Notably, in March of 2008, the Casual List was exhausted for "trailer men" or Class A licensed CDL drivers. (V.II, 326-327).

Mr. Donahue also stated that he considers a driver's experience when selecting individuals from the Casual List for a position. (V.II, p.370). It is necessary to consider a driver's experience because some of the equipment found on movie sets is particularly specialized to the industry. *Id.* In addition, while driving "talent" is a position on the movie sets that does not usually require a certain license, it often requires experience or skills with people. (V.II, p.373-374). He would call drivers from the Casual List and ask them about their experience, qualifications and availability. (V.II, 383-384).

6. Robert Wright

Robert Wright is a member of Local 25 in the Movie and Theatrical Division. (V.III, p.654). Mr. Wright worked as a Captain in 2007 and was a Transportation Coordinator for the production "The Lonely Maiden" in 2007. In Mr. Wright's experience, probably 95 to 97% of the jobs he filled required a CDL, either Class A or Class B. (V.III, p.655).

Mr. Wright worked with Denise Avallon on several productions. (V.III, p.656). On “What’s the Worst That Could Happen?”, Mr. Wright started out driving a 12 passenger van but was reassigned to driving Mr. Jeffrey Curtland from wardrobe shortly thereafter. (V.III, p.657).

Mr. Wright initially drove Mr. Curtland for a short time because Denise Avallon was taking the weekend off to go to a wedding. Mr. Wright was to replace Ms. Avallon as a driver for Mr. Curtland during the weekend. As Mr. Wright began driving Jeff Curtland around, he informed him that it was nice to have someone who knew where they were going. He complained that when he asked Ms. Avallon to take him somewhere, she would ask him “How do I get there?” (V.III, p.664). Mr. Curtland would respond “I don’t know, I’m from California”. *Id.*

After Mr. Wright had driven Mr. Curtland for two days during the weekend, Mr. Curtland asked if it was possible for Mr. Wright to become his regular driver. Mr. Wright responded that he had a position as a van driver and that he would have to take up the issue with the Coordinators, Mr. Flynn and Mr. O’Brien. (V.III, p.664-665).

Mr. Wright went back to his position driving a passenger van. (V.III, p.667). He then recalled that on Monday, June 12, the lead actor, Martin Lawrence, informed the Director and Mr. Curtland that he did not like his outfit and his shoes and he wanted something different to wear. (V.III, p.667). Everyone on the set was waiting for Mr. Curtland to get something else for Mr. Lawrence to wear. (V.III, p.668). Ms. Avallon drove Mr. Curtland to Filene’s, a Department store in downtown Boston, to quickly get the actor a new outfit. Everyone waited for an hour and a half to two hours, until Mr. Curtland returned to the set in a cab. Mr. Curtland said he could not find Ms. Avallon and he had to take a cab back to the set. (V.III, p.668). After

this incident, Mr. Curtland went to the producers on the set to **complain** about Avalon. (V.III, p.668).

After Curtland complained about this incident, Mr. Flynn approached Mr. Wright with Billy O'Brien and told him that he was taking Denise Avallon's driving position. Robert Wright was then the driver for Jeff Curtland in wardrobe for the remainder of the production. (V.III, p.669).

When Mr. Wright was driving Mr. Curtland, he was also told about another incident regarding Ms. Avallon. About a week before the filming began, she used to take the wardrobe crew from a location in Cambridge to the hotel. On one occasion while driving down Storrow Drive, Ms. Avallon ducked and put her hands up when they went under a low bridge. Mr. Curtland had to put his hands on the wheel because he felt the van might crash. (V.III, p.675).

Mr. Wright also observed that generally, Ms. Avallon would not be in her van while she was working on the set. She would be walking around and leave her van unattended. There were numerous occasions when people would get into her van and wait for her to return. Eventually, Mr. Wright would pull up in his van and ask the passengers to get in so he could take them where they needed to go. (V.III, p.676).

II. Statement of Issues

- A.) Whether there is sufficient evidence in the record to find that the Union violated Section 8(b)(1)(A) in the operation of its hiring hall? (Exceptions 1-5, 9)
- B.) Whether there is sufficient evidence in the record to find that referring Avallon would have jeopardized its relationships with contracting employers? (Exceptions 6-8, 11)

III. Argument

A. Substantial Evidence in the Record Shows That Local 25 Utilizes Objective Criteria for Referrals and Has Not Violated the Act.

In this case, the evidence, as a whole, showed that Local 25 applied objective criteria in selecting members for referral from the Casual List. Each of the Transportation Coordinators attested to the fact that individuals were selected based upon their *qualifications, experience and availability*. In spite of this substantial evidence, the ALJ in this case misconstrued the evidence and incorrectly found that the TCs in this case did not hire individuals who were unknown to the TCs, and that the TCs hired people not on the casual list.

Local 25 asserts that the unwritten criteria that it utilizes are consistently applied and have been approved by the Board. In *Morrison-Knudsen Co.*, 291 NLRB 250 (1988), the union representative referred applicants on the basis of their skills and experience as determined by his judgment. The Board noted that such practices may lend themselves to abuse, but that they were not sufficient themselves to prove such abuse. It found that the Union was required to refer the most qualified individual to the position and could, in good faith, determine the qualifications of hiring hall applicants. The Board agreed that the employees were referred based upon skills and experience since there was no evidence of discrimination based upon the exercise of Section 7 rights, race or sex, or any other impermissible factor. *Id.* at 250-251. Although there were apparently no “objective criteria” with respect to evaluating experience and qualifications, the determination was found to be objective based upon the fact that a record was made of the individual’s qualifications and referral records which showed whether he had worked in the past. *Id.* at 251.

Here, Local 25’s Referral Rules give employers the right to choose the drivers from the Casual List. However, production companies have opted not to select the drivers, but instead

believe that the Transportation Coordinators are in the best position to select which driver gets which particular assignment for the most part. The substantial record produced at the hearing reveals, however, that the specific referrals were shown to be based upon qualifications and experience. At any rate, there is no evidence that agents of Local 25 discriminated *against anyone* based upon an exercise of Section 7 rights, showed favoritism to personal friends, or otherwise used their positions in a corrupt manner. In fact, Local 25 has agreed in its collective bargaining agreements with productions companies to refer drivers “to the Company from the Union on a nondiscriminatory basis, and such referral will in no way be affected by Union membership or any aspect thereof”. (GC-54, Art.VI).

Moreover, the determination of which individuals to refer was based upon an **objective record**. Despite the ALJ’s assertions to the contrary (Decision, pg. 19), there are voluminous records which show an individual’s experience and qualifications because individuals are required to submit resumes and licenses which are maintained by the Union. The records and call sheets also show which individuals had worked on the movies in positions in the past. Mr. O’Brien, Sr. testified clearly to making copies of individual driver’s licenses to document their qualifications. Numerous witnesses testified about drivers submitting their resumes and some were entered into the record. This documentation certainly supports a Transportation Coordinator’s ability to make reasoned judgments about an individual driver’s experience in the movies or qualifications.

In *International Alliance of Theatrical and Stage Employees Local 592 (Saratoga Performing Arts Center, Inc.)*, 266 NLRB 703, 709 (1983), the Board found that referring workers according to very similar criteria - seniority, ability and availability - was an acceptable objective standard under the Act. The union business agent selected crew members based upon

substantially identical criteria used by Local 25 in the present case. *Id.* at 705. The administrative law judge noted that this union agent was in the best position to evaluate the abilities and qualifications of crew members, and following the teachings of *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961), he would not presume that the agent had acted unlawfully or arbitrarily when he performed this function. *Id.* at 710. He noted that under *Teamsters Local 357, supra*, if hiring halls are to be subjected to regulation “that is less selective, more pervasive, and more businesslike, Congress and not the Board is the agency to do it”. *Id.*

Job referrals are often based upon experience – those with more experience, get more referrals. If an objective criterion is being used to make the referrals, the NLRB’s inquiry into the referral process should end. As stated by the Court in *Teamsters Local 357, supra*, the NLRA forbids discrimination based upon union membership, and this has been interpreted to require that unions use objective standards when making referrals in an exclusive hiring hall. It does not require, however, that every union have a formal, comprehensive referral procedure for every job that it assigns.

The third criterion used by Local 25 is an individual’s availability. A person on the Casual List simply must answer his or her phone when called by a TC. Being readily available for work is an important factor in a dynamic and time-sensitive industry. The Board has also recognized time constraints as a legitimate basis for not following certain referral procedures. *Local Union 460 of Plumbing and Pipefitting Industry*, 280 NLRB 1230 (1986). In that case, the Union argued that it needed to quickly fill short-term positions. It stated that requiring the Business Agents to go through the routine of making 50 to 60 phone calls at night or over the weekend for short-term jobs was not required and failing to do so amounted to a *de minimus* act and was not a violation of the NLRA. *Id.* at 1235. See *International Alliance of Theatrical and*

Stage Employees Local 592(Saratoga Performing Arts Center, Inc.), supra at 710 (1983) (finding the union's actions warranted where calls were made on short notice, for varying durations and for different numbers of employees because "the show must go on").

1. Unions Must Be Allowed Reasonable Judgment to Make Referrals.

In this case, the ALJ ignored the fact that complete objectivity, in the sense of uncritically referring individuals off a list, is simply impossible to implement with respect to the Casual List in the movie industry. With the Seniority List, Transportation Coordinators are able to mechanically refer the next name on the List for the most part because all the drivers are commercially licensed and have significant experience in the movie industry. However, the Casual List members have not been similarly "vetted". In fact, the testimony showed that any dues or fee paying member was allowed to be placed on the Casual List whether or not they had a CDL or any other driving or movie transportation experience. Local 25 cannot just increase the number of members on the Seniority List to meet transitory needs when the movie productions increase because it is not likely that the industry will be able to sustain that level of employment on a regular basis. Hence, the Casual List is necessary to use in the movies on an ad hoc, temporary basis when the Seniority List is exhausted. In Local 25's experience, it is often used by members in other industries who are laid off or in between employment, but is not intended to provide regular, full time employment.

The testimony of the TCs confirmed that the Casual List could not be ministerially administered. Some of the drivers on the list did not possess CDL's, others did. Some had special endorsements, and some had certain specialized experience. Sometimes certain specialized equipment was being used, and sometimes talent needed a certain type of personality. For example, Mr. O'Brien, III and Mr. Kelleher testified that they had Class A drivers who were

not familiar with a certain piece of equipment used in the movie industry.⁶ Whereas, other driving positions, such as van drivers and star drivers, required knowing directions in the area and a certain level of skills with the type of people who worked in the industry.

As a practical matter, it is just not possible for TCs to assign jobs based strictly on numerical order since there are no minimal or baseline requirements for licensing or experience to be on the Casual List. The evidence showed there are a fairly large variety of different types of driving positions required on a movie set. See *International Alliance of Theatrical and Stage Employees Local 592(Saratoga Performing Arts Center, Inc.)*, *supra* at 710 (finding subjective evaluation by union agent warranted in part because stage work required a variety of skills which all crew members did not possess). There are also vast differences in the experience and licensing of individuals who are placed on the Casual List. In this system, Local 25 recognizes that some reasonable judgment is required of the Transportation Coordinators when making a referral of any given individual from the Casual List to any given position in the movies. Each of the Coordinators attested to the fact that individuals were nonetheless selected based upon objective criteria – their qualifications, experience and availability. Local 25 asserts that such an exercise of reasonable judgment is necessary to perform its representative function in this industry.

The exercise of reasonable judgment by a union when making referrals has been approved by the Board. In *Plasterers and Cement Masons, Local No. 299 (Wyoming Contractors Association)*, 257 NLRB 1386 (1981), the Administrative Law Judge stated:

Accordingly, it is beyond doubt that a Union may use reasonable judgment in determining whether to send a given individual to a given job. This is so without regard to the presence or absence of specific, additional “qualifications” restrictions which may be inserted into labor agreements providing for exclusive

⁶ Business Agent Mark Harrington also testified about finding drivers with a Hazardous Materials endorsement for fuel trucks, and other endorsements or experience for car haul trucks or the honey wagon.

hiring halls. Especially where, as here, a Union has lawfully committed itself by contract to make classification judgments relating to a job-seeker's qualifications, it is an unmistakable part of a Union's effective performance of its representational function to avoid referring individuals who do not satisfy the contractual prerequisites for referral. *Id.* at 51-52 (emphasis added).

The Administrative Law Judge found control and regulation over the hiring process through the operation of exclusive hiring halls is a common and essential means through which unions in the building and construction industry effectively represent employees in that industry.

Id. at 50. As he explained:

[I]n order to achieve that exclusive hiring hall status with construction industry employers, some quid pro quo is usually required. As herein, it usually takes the form of the contractual requirement that the union furnish only "qualified" help. Thus, when a Union seeks, in the interest of its constituency as a whole to have initial influence in the regularizing and decasualization of the hiring process through the operation of the exclusive hiring hall, it must have credibility with employers as being a reliable source for the furnishing of trained and experienced personnel. And, while it is true that the Union's primary purpose is not so much to act as a "screening" agency for employers as it is to ensure that its constituents get their fair share of work opportunities under controlled conditions, a union necessarily must employ reasonable eligibility standards in selecting applicants for referral. If it fails to do so and uncritically refers individuals to jobs without regards to their qualifications for the work, it ceases to have any real value to employers in the industry and thereby undermines its own proper interest in playing a central role in the hiring process. *Id.* at 51.

As explained above, Local 25 would undermine its own interests and ability to represent the drivers in the movie industry if it was required to uncritically refer individuals from the Casual List. Local 25 needs to exercise reasonable judgment in applying its objective criteria to select individuals to refer from the Casual List, or it will lose credibility with the production companies and the ability to effectively represent its members.

In many respects, the criteria used by Local 25 in making referrals from the Casual List are more objective than those which have been approved by the Board in the above cases. Qualifications here have to do with the type of license that is required for the specific position

and by definition is objective on its face. All TCs agreed that an individual's driver's license classification was the first and *most important factor* they considered when selecting drivers from the Casual List. Accordingly, Local 25's referrals from the Casual List were primarily based upon a criterion which does not require the judgment of the TCs to determine.

Second, as discussed above, the TCs had to exercise some judgment to determine an individual's experience, given the variety of positions in the movie industry and the varying levels of qualifications on the Casual List. Basing job referrals on past work experience itself is not unlawful. *See e.g., International Marine Terminals, Inc.*, 137 NLRB 588 (1962). Congress itself has recognized under Section 8(f)(4) that experience in the industry is a factor that may be lawfully relied upon in granting referral preferences in the construction industry. 29 U.S.C. § 158(f)(4) (priorities for employment based upon length of service in the industry is not an unfair labor practice).

2. The Evidence Showed "Unknown" Drivers Were in Fact Referred.

The ALJ in this case ignored the substantial evidence showing that Local 25 used objective standards to refer individuals and relied upon findings not supported by evidence to conclude that Local 25 violated Section 8(b)(1)(A) in the operation of its hiring hall. Despite voluminous evidence to the contrary, the ALJ concluded that the TCs do not refer drivers that they have not previously worked with.

The ALJ found that Local 25 has failed to refer individuals who are unknown to its TCs. Decision, p. 18. As far as referring individuals who are "known" to the TCs, the allegation is largely semantics. The TCs all testified that when they used the word "known" in referring individuals, they meant that they were familiar with the individual's work history and license qualifications. They did not suggest that they "knew" certain drivers in the sense of going out to

dinner with them. If you put the TCs' testimony into more bureaucratic language, they are really considering the objective factors of experience and qualifications.

Furthermore, there are voluminous examples of new, inexperienced drivers being referred off the Casual List. Just the numbers alone here show that many new drivers came into the movie industry for the first time as the number of productions increased. During the first half of 2008, the Casual List went from about 38 to over 274. (V.III, p.727-729). Mr. Carnes further stated, "Time and time again I would interview new guys." (V.III, p.643) Mr. Kelleher gathered a contingent of largely inexperienced drivers for "Bride Wars". (V.II, p.305, stating "a lot of them it was their first time"). Mr. O'Brien, Sr. stated it did not make a difference to him whether or not he personally knew someone. (V.III, pg.562).

Several of the Coordinators attested to the fact that they would refer drivers who had worked with them on a previous production. This testimony just shows that experience in the movies in a certain position or with certain equipment may be considered in future referrals, and is not unlawful. Moreover, the testimony also begets the fact that on the initial production, the driver must have been "unknown" to the Coordinator.

3. The Evidence Did Not Establish That Non-List Individuals Were Referred.

The second basis for finding that Local 25 violated the Act was that some of the TCs testified to occasions when non-listed drivers were referred out for a production. It is most surprising that the ALJ failed to acknowledge that Local 25 used individuals not on the Casual List once *the Casual List was exhausted for qualified drivers!*

The record established that at the time that "Bride Wars" was going on, the casual list was exhausted for CDL drivers. (V.II, 326-327). Mr. Kelleher called the union hall and got the

names from Mark Harrington of “oilmen” who were laid off **after the Casual List had been exhausted**. (V.II, pg 284)(emphasis added).

Regarding whether or not “day players” were on the Casual List, Mr. Kelleher stated: “as this industry and the volume grew, the list – I got one list in the beginning. There was constantly people being added to the list.” (V. II, Pg. 290). The ALJ clearly erred and misconstrued the evidence in his conclusion: “Kelleher referred/hired day players Bill Owerka, Jim Bilack, and Mark Cavanaugh for the “Bride Wars” production, none of whom are contained on the casual list. Kelleher also hired/referred other drivers to “Bride Wars,” including the following drivers, none of whom appear on the casual list: Chad White, Pat Friel, Billy Owerka [sic].”

However, Bill Owerka, who is listed twice by the ALJ is number 173 on the March Casual List. Jim Bilack is number 166 on the same list. Mark Cavanaugh is number 212 on the April casual list (GC Exhibit 23) and Chad White is number 187. Pat Friel is listed at number 105 on the list, and he appears on the first Casual List for March (GC Exhibit 14). The ALJ is simply incorrect in his conclusion that that the drivers do not appear on the Casual List.⁷

The ALJ also concludes that O’Brien, Sr. referred individuals who were not on the list just from the testimony that Mr. O’Brien referred individuals who were “laid off or lost their jobs.” Just because Mr. O’Brien hired some drivers put out of work by the closure of a trucking company (Decision 11, 18), it does not mean that the drivers were not on the Casual List. The Casual List is in fact intended to be composed of drivers in that exact situation. Mr. O’Brien’s testimony on this point cannot be used to support the ALJ’s conclusion that non-listed drivers were referred.

⁷ The ALJ also clearly erred in stating “Wright called Harrington for the names of out of work oilmen.” Decision, pg. 18. However, nowhere in the record did Wright make any such statement.

Perhaps even more important is the fact that most of the drivers listed as examples in the decision had a higher license designation than Ms. Avallon. Jim Bilack, Mark Cavanaugh, Chad White and Pat Friel are CDL licensed drivers with Class A licenses. Bill Owerka is a CDL licensed driver with a Class B license. The ALJ also discussed several of the drivers referred by Carnes in the decision. Pg. 14. Again, they were, for the most part, CDL licensed drivers. Jeffrey Vance (#254), Joseph Travers (#69) and Jacob Hackett (#18) were Class A licensed drivers. (GC Exhibit 26). The fact that these drivers had positions in the movies is really of no relevance to whether the Charging Party was referred to a position since she was not a CDL licensed driver. She was not even qualified for the positions.

Moreover, the ALJ further states that “O’Brien, III, called retired drivers and drivers from other unions when the casual list was exhausted, but didn’t call Avallon, who was on the list.” Decision, pg. 18. The ALJ misses the fact that is very obvious to the TCs – Avallon did not possess a CDL and could not be placed in the vast majority of the positions in the movies.⁸ When the Casual List was exhausted, it was exhausted for **CDL drivers**. None of the TCs ever testified to not being able to find a Class D driver such as Ms. Avallon. The ALJ cannot fault the TCs for going to the union hall, other locals or retirees to find available CDL licensed drivers when the casual list was exhausted for CDL drivers. They needed drivers to fill the positions usually on short notice, and Ms. Avallon was not an option. Here, the ALJ compares apples and oranges to conclude that the Charging party was discriminated against under the Act.

The ALJ misconstrued and misinterpreted much of the evidence presented by the TCs. Mr. Carnes clearly testified that John Fiddler had a Class B license. (V.III, pg. 595) However, the ALJ questioned this because the call sheet lists Fiddler as having a non-CDL license. The

⁸ The testimony in the record showed that Mr. Carnes and Mr. Harrington estimated that 90% of Local 25 drivers on a movie set need to have a CDL. (p.71; p.645). In Mr. Wright’s experience, probably 95 to 97% of the jobs he filled required a CDL, either Class A or Class B. (p.655).

call sheet in question (GC Exhibit 26), and all the call sheets introduced into evidence, showed the license designation for the **position** – what was required to drive the designated vehicle – not the license designation for the current **driver**. Thus, the ALJ seems to lack a basic understanding of what the exhibits in evidence represented.

B. Substantial Evidence Showed That The Actions Taken By Teamsters Local 25 Regarding the Charging Party Were Necessary to the Effective Performance of Its Representative Function.

The ALJ erred in finding that no employer ever requested that Avallon be removed from a production, dismissed from a job or complained about her work performance to the Union. Decision 21-22. The record contained ample evidence of employer complaints about Avallon that were improperly disregarded by the ALJ.

When a union prevents an employee from being hired in an exclusive hiring hall, the Board has adopted a presumption that the union is demonstrating its influence over the employee and its ability to affect his or her livelihood so that the effect of its action is to encourage union membership. But the inference may be overcome and the presumption rebutted in instances when the facts show that the union action was necessary to the effective performance of its function of representing its constituency. *International Union of Operating Engineers, Local 18 and William Murphy*, 204 NLRB 681 (1973) (citations omitted). Similarly, a union's departure from established exclusive hiring hall procedures which results in a denial of employment violates the National Labor Relations Act unless the union can show that it was "necessary to the effective performance of its representative function." *Operating Engineers Local 460 and Lamar Honey*, 262 NLRB 50, 51 (1982).

A union may overcome an unlawful inference by showing that the union refused to refer the applicant based upon a history of misconduct. *Stage Employees IATSE Local 150 (Mann*

Theaters) and *Roy Alan Simon*, 268 NLRB 1292 (1984). There the employee had been banned by several employers based upon poor work performance and serious misconduct. The union argued that because of the employee's history of misconduct and incompetence, his continued referral would jeopardize the union's position as the employer's exclusive source of employees and diminish the effectiveness of the representation of its constituency. Citing *Plasterers Local 299, (Wyoming Contractors Association)*, 257 NLRB 1386 (1981), the Board found that the union had used reasonable judgment in making this determination. *Id.* at 1296.

In *Plasterers Local No. 299 (Wyoming Contractors Association)*, *supra*, the Board found that the Charging Party was lawfully not referred based upon the union's judgment as to his background experience and work performance. There was no evidence of bad faith or hostile consideration on the part of the union. *Id.* at 52.

The totality of the evidence showed that Ms. Avallon was not a qualified or competent driver. She did not possess a CDL, and did not have the ability to obtain one. Given the TCs' uncontradicted testimony about the need for commercially licensed drivers, Ms. Avallon would not be considered for the vast majority of driving jobs on any movie production set. Local 25 provided evidence that there were not work opportunities for all of the non-CDL drivers on the Casual List during 2009. The ALJ wrongfully ignored the fact that there are *simply limited work opportunities for non-commercially licensed drivers* on the Casual List. She had no legitimate expectation for significant work opportunities as a Class D driver on the Casual List, even if her problematic work history was not considered.

In addition, the record also shows numerous complaints about Avallon, and she admitted that she had previously been removed from a driving position because she did not know her way around. Mr. O'Brien, Sr. worked with Denise Avallon on "Message in a Bottle." (V.III, p.552).

Mr. O'Brien, Sr. recalled complaints regarding Ms. Avallon on the movie. He stated "**the producer came to me about her stalking Kevin Costner**". (V.III, p.552). Regarding this incident, Mr. O'Brien, III saw security guards escort Ms. Avallon away from Costner's camper. (V.II, p.454).

Mr. O'Brien, Sr. also worked with Ms. Avallon on "What's the Worst that Could Happen?" Mr. O'Brien, Sr. stated that the wardrobe supervisor came to him and said that while driving down Storrow Drive, Ms. Avallon took her hands off the wheel and put her hands over her eyes while ducking. Mr. O'Brien, Sr. eventually reassigned Ms. Avallon to a different van based upon employer **complaints** on this set. (V.III, p.560). Hence, she was removed from her position based upon employer complaints.

Several witnesses credibly confirmed that Avallon endangered passengers by taking her hands off the wheel when driving a van on the set of "What's the Worst That Could Happen?". Crew members did not want to ride in her van and felt nervous driving with her.

The TCs are responsible for selecting the drivers of passengers on the set. If a Coordinator, such as Billy O'Brien, III, (V.II, p.459), does not reasonably believe that Ms. Avallon is a safe driver, it is necessary for him not to refer her to a driving position. Refraining from referring unsafe drivers to the signatory movie production companies is part of his performance of his representative function. See *Bechtel Power Corp.*, 215 NLRB 647 (1974) (heart attack victim and worker suffering from fear of heights lawfully excluded from job site since referral priority may be based on objective factors such as safety). Other Coordinators witnessed Ms. Avallon stalking talent on the set, smoking in her van, holding up traffic and leaving her passenger stranded downtown.

In *Lucas v. NLRB*, 333 F. 3d 927 (9th Cir. 2003), the Court found that the Board's decision was not supported by substantial evidence where the charging party was expelled from the hiring hall for alleged misconduct, but the nature of the misconduct, its frequency, the identities of the alleged victims, and the employer responses, if any, were not admitted into evidence. *Id.* at 936. Here, voluminous evidence exists in the record regarding the nature of Avallon's specific alleged misconduct, its frequency, victims and employer responses. Five different Transportation Coordinators testified from personal knowledge to numerous and serious incidents involving Ms. Avallon when she was a driver in the movie industry. Thus, Local 25 has shown substantial evidence of Ms. Avallon's misconduct and a good faith basis for failing to refer her.

In sum, when Ms. Avallon is evaluated with the objective criteria used by Local 25 in referring drivers from the Casual List, the reasons for her not being referred are readily apparent. Her qualifications are as a Class D, non-commercially licensed driver with no special driver endorsements or experience. Her work experience shows a history of misconduct and incompetence in the movie industry, including endangering passengers, damaging property and failing to perform her duties. Is Local 25 really supposed to refer a driver who has damaged property, endangered passengers and been escorted off a movie set by security? Such a finding by the ALJ clearly prevents Local 25 from effectively performing its representative function and must be reversed.

Furthermore, there is no evidence in the record to show that there was any type of unlawful animus toward Ms. Avallon. Local 25 allowed her to be placed on the Casual List even though she had previously resigned from the list and did not have a CDL. No Local 25 Agent told any of the Transportation Coordinators not to refer her. Those TCs who had witnessed

problems with her in the performance of her duties on the set opted not to refer her, while those that were unfamiliar with her work attempted to call her. Thus, all the evidence in the record shows that the failure of Local 25 to refer Ms. Avallon to a driving position in the movie production industry was objectively based, necessary to the effective performance of its representative function and lawful.

IV. Conclusion

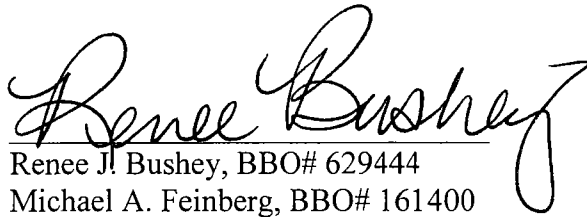
In sum, the evidence as a whole established that Local 25 applied objective criteria in selecting members for referral from the Casual List. Each of the Transportation Coordinators attested to the fact that individuals were selected based upon their *qualifications, experience and availability*. Where necessary, the Transportation Coordinators lawfully used reasonable judgment when making a referral of any given individual from the Casual List to any given position in the movie production industry.

The record also showed that the failure of Local 25 to refer Ms. Avallon to a driving position in the movie production industry was objectively based and necessary to the effective performance of its representative function. Ms. Avallon had no legitimate expectation for significant work opportunities as a Class D driver on the Casual List, even if her problematic work history was not considered. However, her prior work experience showed that she had endangered and abandoned passengers, damaged property, harassed talent and otherwise failed to perform her job.

For all the above reasons, Respondent Teamsters Local 25 respectfully requests that the Decision of the Administrative Law Judge be reversed and that the Complaint against Local 25 be dismissed in its entirety.

Respectfully submitted,

For International Brotherhood of Teamsters, Local 25,
By Its Attorneys,

A handwritten signature in cursive script, reading "Renee Bushey". The signature is written in black ink and is positioned above a horizontal line.

Renee J. Bushey, BBO# 629444

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Dated: August 23, 2010

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I hereby certify that true and correct copies of the foregoing document was served via e-mail to Joseph F. Griffin, Esq. and Karen E. Hickey, Esq., National Labor Relations Board, Region One, 10 Causeway Street, Room 601, Boston, MA 02222.

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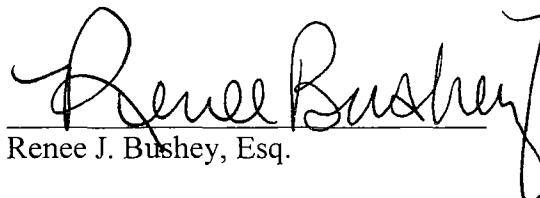
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